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In the Supreme Court of the United States

OCTOBER TERM, 1943

CITY OF MILWAUKEE, J. J. KRUEGER, CITY TREASURER OF THE CITY OF MILWAUKEE, COUNTY OF MILWAUKEE, AND C. M. SOMMERS, COUNTY TREASURER OF MILWAUKEE COUNTY, PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 816

CITY OF MILWAUKEE; J. J. KRUEGER, CITY TREASURER OF THE CITY OF MILWAUKEE; COUNTY OF MILWAUKEE; AND C. M. SOMMERS, COUNTY TREASURER OF MILWAUKEE COUNTY, PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 37–42) is reported in 49 F. Supp. 436. The opinion of the circuit court of appeals (R. 61–65) is reported in 140 F. 2d 286.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered on January 20,

1944 (R. 66). The petition for writ of certiorari was filed on March 27, 1944. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925.

QUESTION PRESENTED

Whether land owned by the United States through the Federal Public Housing Authority, used as a site for a low-cost housing project, over which exclusive jurisdiction has not been obtained, but which Congress has declared to be immune from state and local taxation, is subject to an *ad valorem* property tax imposed by the State of Wisconsin and its political subdivisions.

CONSTITUTIONS AND STATUTES INVOLVED

The pertinent provisions of the United States Housing Act of 1937, 50 Stat. 888, 42 U. S. C., secs. 1401–1430, together with the pertinent provisions of Art. II, sec. 2 of the Wisconsin Constitution, and c. 86, Wisconsin Laws of 1941, sec. 70.11 (1), are set out in the Appendix, *infra*, pages 13–16.

STATEMENT

Pursuant to authority granted in Title II, sec. 203 of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 201, 40 U. S. C., secs. 402, 403, the Administrator of that Act, in 1935, purchased for the United States certain land located in the City of Milwaukee as a site for construc-

tion of a low-cost housing and slum-clearance project (R. 5–23). Construction of the project was initiated by the Administrator, but completed by the United States Housing Authority,[1] a governmental agency created under the United States Housing Act of 1937, 50 Stat. 888, 42 U. S. C., secs. 1401–1430, for the purpose of coordinating all governmental housing activities.

In the 1937 Act, Congress declared its policy to promote the general welfare by assisting the several states in eliminating unsafe and unsanitary housing conditions "injurious to the health, safety, and morals of the citizens of the Nation" (sec. 1, 42 U. S. C., sec. 1401). The Act created the United States Housing Authority as an instrumentality of the United States and provided that all existing federal projects should be transferred to and administered by that agency (sec. (d), 42 U. S. C., sec. 1404 (d). The Act contemplated that all existing federal projects, where possible, should be sold or leased to state housing agencies (sec. 12, 42 U. S. C., sec. 1412 (a)), but the Authority was also given the right to administer the projects directly (sec. 4 (d), 42 U. S. C. sec. 1404 (d) and sec. 12 (a), 42 U. S. C., sec. 1412 (a).[2]

[1] Now known as the Federal Public Housing Authority. The change of name is provided for in Executive Order No. 9070, dated February 24, 1942 (7 F. Reg. 1529). The two names will be used herein interchangeably.

[2] In the main, the early federal projects have now been conveyed or leased to local housing authorities, as provided in the Act. Despite the fact that Wisconsin has a local

The Act specifically provides for tax exemption as follows (sec. 5 (e), 42 U. S. C., sec. 1405 (e)):

> The Authority, including but not limited to its franchise, capital, reserves, surplus, loans, income, assets, and property of any kind, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, county, municipality, or local taxing authority. Obligations, including interest thereon, issued by public housing agencies in connection with low-rent-housing of slum-clearance projects, and the income derived by such agencies from such projects, shall be exempt from all taxation now or hereafter imposed by the United States.[3]

In the same Act, Congress provided that the Authority should have power to enter into agreements to pay sums "in lieu of taxes" with respect to any of its real property (42 U. S. C., sec. 1413 (c)).

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housing law (sec. 66.40, Wis. Stat. 1943), no local housing agency has ever been established in Milwaukee. Consequently, this project has at all times been administered directly by the Federal Public Housing Authority and in this sense does not present a typical situation.

[3] The original National Industrial Recovery Act under which this land was purchased and construction started did not contain a specific declaration that land acquired by the Federal Emergency Administrator of Public Works should be tax-exempt. That Congress intended and presumed it would enjoy the usual federal immunity, however, is indicated by the fact that provision for payment of sums in lieu of taxes was made in section 2 of the Act of June 29, 1936, 49 Stat. 2026, 40 U. S. C., sec. 422, a provision which would obviously be unnecessary if the property was itself taxable.

Thereafter, Executive Order No. 7732, effective November 1, 1937, 2 Fed. Reg. 2324, 40 U. S. C., sec. 401, note, transferred to the United States Housing Authority "all right, interest, and title held by the Federal Emergency Administration of Public Works in any housing or slum-clearance projects constructed or in the process of construction on the date of enactment of the said Act." [4]

In March, 1938, the United States Housing Authority offered to pay the City of Milwaukee in lieu of taxes the sum of $1,109.00 for the year 1937 and the sum of $6,970.00 for 1938 and the four succeeding years. In September, 1940, the offer was renewed (R. 15, 33). The figure $1,109.00 represented $^7/_{12}$ths of the annual taxes which were formerly assessed against the land comprising the project site. For the year 1937 only $^7/_{12}$ths of the former assessment was offered because the project had been occupied for only seven months of that year. The figure $6,970.00 offered for subsequent years represented 5 percent of the annual gross rent roll, less 5 percent

[4] Since the title to any property acquired by the Federal Emergency Administration of Public Works was in the United States, the effect of this Executive Order was to transfer the technical title to the property here involved to the United States Housing Authority. However, for tax purposes, there is no distinction between property owned by the United States and property owned by the United States Housing Authority. *Clallam County* v. *United States*, 263 U. S. 341, 345; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477.

of the estimated cost of heat, hot water and electricity (R. 21, 34–36).[5] On both occasions the City refused to accept this offer of payment on the ground that it was inadequate (R. 15, 33).

With the parties thus in disagreement, the Legislature of Wisconsin on May 7, 1941, enacted c. 86, Wis. Laws 1941, specifically providing that property of the United States should not be exempt if used for residential, rental income-producing purposes (R. 26–27, Appendix, *infra*, pp. 15–16). For the 1941 tax year, county taxes in the sum of $23,591.95 and city taxes in the sum of $44,066.00 were assessed against the property (R. 3, 11, 28), and the defendants admitted that they intend to assess and levy taxes against this property for future years (R. 11, 27–29). To have these existing taxes declared void and to enjoin future taxation, the present suit was brought (R. 2–4). The district court granted the requested relief (R. 42–43) and the circuit court of appeals affirmed (R. 66).

[5] In administering and fixing rentals for the project, the Federal Public Housing Authority carries out the directions of Congress embodied in section 12 (e) of the Act (42 U. S. C., sec. 1412 (e), as follows: "In the administration of any Federal low-rent-housing project pending sale or lease, the Authority shall fix the rentals at the amounts necessary to pay all management, operation, and maintenance costs, together with payments, if any, in lieu of taxes, plus such additional amounts as the Authority shall determine are consistent with maintaining the low-rent character of such project."

ARGUMENT

1. Petitioners do not attack the general constitutionality of the United States Housing Act of 1937, wherein Congress has provided for the establishment of low-cost housing projects and has expressly declared that property of the United States Housing Authority should be tax-exempt. Therefore the case falls squarely within the decisions of this Court in *Pittman* v. *Home Owners' Loan Corporation,* 308 U. S. 21, 32, and *Federal Land Bank* v. *Bismarck Co.,* 314 U. S. 95, 103. As the governmental activity involved is indisputably valid, the power of Congress to declare that activity tax-exempt follows as a matter of course. Cf. *Maricopa County* v. *Valley National Bank,* 318 U. S. 357; *Van Allen* v. *Assessors,* 3 Wall. 573.

2. Petitioners ask (Pet. 7–9) that *Van Brocklin* v. *Tennessee* (sometimes cited by them as *Van Brocklin* v. *Anderson*), 117 U. S. 151, holding federal real property exempt from state taxation, be re-examined and overruled, or in the alternative that the rule of that case be held inapplicable to "income-producing real estate" of the United States. Since, however, the property herein involved was expressly declared exempt by Congress, no question of an implied exemption, such as in the *Van Brocklin* case, is presented. In any event, in the 57 years since that case was decided, this Court has repeatedly reaffirmed the principle that real property owned by the United States or

its instrumentalities enjoys a constitutional immunity from state taxes in the absence of the consent of Congress. See *Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643, 645; *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89, 91; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; cf. *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504; *Irwin* v. *Wright*, 258 U. S. 219; *United States* v. *Alabama*, 313 U. S. 274, 279; *Standard Oil Co.* v. *Johnson*, 316 U. S. 481. In fact, *Van Brocklin* v. *Tennessee* was cited with approval as late as the last term of this Court. *Mayo* v. *United States*, 319 U. S. 441, 447. Petitioners' contention that a federal activity may be valid but nevertheless taxable where it is of a proprietary nature, has already been rejected (*Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Loan Corporation*, 308 U. S. 21, 32; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 101–102) and furnishes no reason for re-examining *Van Brocklin* v. *Tennessee*. Cf. *City of New Brunswick* v. *United States*, 276 U. S. 547.

3. Petitioners also contend that the Federal Government's immunity from taxation by the states should be applicable only in areas over which the United States has acquired exclusive jurisdiction.[6]

[6] It is conceded that the United States does not have exclusive jurisdiction over the Milwaukee project. Sec. 1 of the Act of June 29, 1936, 49 Stat. 2026, 40 U. S. C., sec. 421, and sec. 13 (b) of the Act of September 1, 1937, 50 Stat. 888, 894, 42 U. S. C., sec. 1413 (b) both provide that exclusive jurisdiction shall not be obtained over low-cost housing areas.

The argument on this point is developed (Pet. 13–24) by noting that under Art. I, sec. 8, cl. 17 of the Constitution of the United States, exclusive jurisdiction can be obtained only with the consent of the state; that consequently the state's sovereign right to tax can be considered nonexistent only in those areas where the rights of the United States have attached by state consent. This contention would overturn 125 years of history, for it is basically inconsistent with *McCulloch* v. *Maryland,* 4 Wheat. 316. Its most recent refutation is in *Mayo* v. *United States,* 319 U. S. 441, 447, where this Court said: "A state cannot tax land of the United States situated within the state even though the state has not ceded sovereignty to the United States."

More fundamentally, this argument misconceives the purpose of the "exclusive legislation" clause in the Constitution. That clause was added merely to permit the United States to administer particular areas independently of any concurrent state jurisdiction. To eliminate that concurrent jurisdiction, state consent or cession is necessary. Cf. *James* v. *Dravo Contracting Co.,* 302 U. S. 134. Moreover, the federal government can acquire exclusive jurisdiction, concurrent jurisdiction or partially exclusive jurisdiction over land within the states wholly without reliance on Art I, sec. 8, cl. 17. *Collins* v. *Yosemite Park Co.,* 304 U. S. 518, 529–530.

Congress has recently acted to narrow considerably the instances in which exclusive jurisdiction is obtained even under all-inclusive state consent statutes. Act of February 1, 1940, 54 Stat. 19, as amended by the Act of October 9, 1940, 54 Stat. 1083.[7] If petitioners' contention were correct, all government property, real or personal, within any concurrent jurisdiction area, would be subject to state taxation even though this would mean that large amounts of Army equipment, all federal internal revenue collections on deposit in local banks, and even such minutiae as office equipment, could be taxed if the state so desired.

4. Petitioners imply (Pet. 4–5, 25–26, 30) that the state will be deprived of vital tax revenues and saddled with innumerable burdens unless the Federal Government's tax immunity is restricted to areas where the United States has exclusive jurisdiction. This matter was presumably considered by Congress when it expressly declared federal slum clearance projects exempt from state taxation. Furthermore, the over-all burden on the state is not severe; occupants of these low-cost housing projects are liable for sales taxes, license taxes, personal property taxes, etc.; and the elimination of slum areas effectively combats the conditions that cause disease and crime, thus re-

[7] See *Adams* v. *United States*, 319 U. S. 312; *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 101, note 11; *State* v. *Shepard*, 239 Wis. 345, 300 N. W. 905 (1941).

ducing the amounts heretofore expended by the state and its political subdivisions for police and health protection.

5. Although not relied upon by either of the courts below, this property is also exempt under Art. II, sec. 2 of the Wisconsin Constitution, which provides that "no tax shall be imposed on land the property of the United States" (Appendix, *infra,* pp. 14–15). Since the effect of c. 86, Wis. Laws 1941 (Appendix, *infra,* pp. 15–16), is to violate this constitutional provision, it would seem to be clearly invalid as a matter of state constitutional law. Nor is there a single Wisconsin case which would indicate that this provision would be interpreted as requiring anything more than the mere vesting of title in the United States. Cf. *Mariner* v. *Oconto Land Co.,* 142 Wis. 531, 542, 126 N. W. 34 (1910); *Aberg* v. *Moe,* 198 Wis. 349, 356, 224, N. W. 132 (1929).

6. Finally, petitioners urge that the sums offered in lieu of taxes were inadequate, and for this reason the district court should have refused to grant equitable relief. This is in effect an argument that the United States must pay taxes before it is entitled to an adjudication that its property is tax-exempt. Both lower courts properly refused to consider this contention because, under the Federal statute, payment of sums in lieu of taxes under the United States Housing Act of 1937 is merely permissive, and an exclusive matter for administrative determination.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1944.

APPENDIX

Sec. 1 of the Act of September 1, 1937, c. 896, 50 Stat. 888, provides:

> It is hereby declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation.

Sec. 3 (a) of the Act of September 1, 1937, c. 896, 50 Stat. 888, 889, provides in part:

> There is hereby created in the Department of the Interior and under the general supervision of the Secretary thereof a body corporate of perpetual duration to be known as the United States Housing Authority, which shall be an agency and instrumentality of the United States.

Sec. 5 (e) of the Act of September 1, 1937, c. 896, 50 Stat. 888, 890, provides in part:

> The Authority, including but not limited to its franchise, capital, reserves, surplus, loans, income, assets, and property of any kind, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, county, municipality, or local taxing authority. Obligations, including interest thereon, issued by public hous-

ing agencies in connection with low-rent-housing or slum-clearance projects, and the income derived by such agencies from such projects, shall be exempt from all taxation now or hereafter imposed by the United States.

Sec. 13 of the Act of September 1, 1937, c. 896, 50 Stat. 888, 894, provides in part:

> (b) The acquisition by the Authority of any real property pursuant to this Act shall not deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over such property, or impair the civil rights under the State or local law of the inhabitants on such property; and, insofar as any such jurisdiction may have been taken away or any such rights impaired by reason of the acquisition of any property transferred to the Authority pursuant to section 4 (d), such jurisdiction and such rights are hereby fully restored.
>
> (c) The Authority may enter into agreements to pay annual sums in lieu of taxes to any State or political subdivision thereof with respect to any real property owned by the Authority. The amount so paid for any year upon any such property shall not exceed the taxes that would be paid to the State or subdivision, as the case may be, upon such property if it were not exempt from taxation thereby.

Art. II, sec. 2 of the Wisconsin Constitution, provides:

> The propositions contained in the act of congress are hereby accepted, ratified and confirmed, and shall remain irrevocable without the consent of the United States; and it is hereby ordained that this state

shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations congress may find necessary for securing the title in such soil to bona fide purchasers thereof; and no tax shall be imposed on land the property of the United States; and in no case shall nonresident proprietors be taxed higher than residents. Provided, that nothing in this constitution, or in the act of congress aforesaid, shall in any manner prejudice or affect the right of the state of Wisconsin to five hundred thousand acres of land granted to said state, and to be hereafter selected and located by and under the act of congress entitled "An act to appropriate the proceeds of the sales of the public lands, and grant pre-emption rights," approved September fourth, one thousand eight hundred and forty-one.

C. 86, Laws of Wisconsin 1941, provides:

SECTION 1. Subsection (1) of section 70.11 of the statutes is amended to read:

(70.11) (1) That owned exclusively by the United States, *not including, however, any residential, rental income producing, improved real estate owned by the United States or any corporation whose capital stock is owned by the United States government or any corporate or other agency having control and jurisdiction over and administering any such real estate in this subsection above described, which improved real estate has heretofore or may hereafter be acquired by the United States or any such federal corporation or agency,* or by this state except lands contracted to be sold by the state and except state lands hereinafter provided; but lands purchased